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## ASK KENNEDY

### September 8, 2021

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**Question #1:** How should a bank approach the posting of debit or credit entries for a deceased customer on a single-party account?

**Response:** Article 4 of the Uniform Commercial Code, adopted by North Dakota as Ch. 41-04, N.D.C.C., directly deals with the payment of checks after death:

**41-04-36. (4-405) Death or incompetence of customer.**

1. A payor or collecting bank's authority to accept, pay, or collect an item, or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.
  2. Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or before that date unless ordered to stop payment by a person claiming an interest in the account.
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**Question #2:** If the named individual on a garnishment request has a DBA, but the DBA/business name is not listed on the garnishment, do we include the DBA in the request?

**Response:** A DBA is not a separate entity. It just means that the business owned by an individual and the individual is using a trade name; as such, the DBA name has no legal effect.

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**Question #3:** If an “Official Request for Customer Financial Records” (SFN 874) is received from the ND Department of Human Services, is compliance mandatory and how should it be handled?

**Response:** There are two sections of the North Dakota Century Code dealing with the disclosure of customer of information. The first is N.D.C.C. § 6-08.1-03, dealing with Duty of Confidentiality; and the second is N.D.C.C. § 6-08.5, dealing with Financial Exploitation Prevention. **It is recommended to reach out to the Department of Human Services to ask if they are requesting the information pursuant to one of these sections.**

Section 6-08.1-03 is provided below:

**6-08.1-03. Duty of confidentiality. (Effective through August 31, 2022)**

A financial institution may not disclose customer information to a person, governmental agency, or law enforcement agency unless the disclosure is made in accordance with any of the following:

1. Pursuant to consent granted by the customer in accordance with this chapter.
2. To a person other than a governmental agency or law enforcement agency pursuant to valid legal process.
3. To a governmental agency or law enforcement agency pursuant to valid legal process in accordance with this chapter.
4. For the purpose of reporting a suspected violation of the law in accordance with this chapter.
5. For the purpose of notifying the agriculture commissioner a financial institution has notified a customer of the availability of the North Dakota mediation service.
6. As part of the disclosure made of deposits of public corporations with financial institutions in the security pledge schedule verified by the custodian of securities pursuant to section 21-04-09.
7. For purposes of reporting suspected exploitation of an eligible adult as defined by section 12.1-31-07. This subsection may not be construed to impose a duty on a financial institution to investigate an alleged or suspected exploitation of an eligible adult or to make a report to a governmental agency or law enforcement agency.
8. For purposes of reporting suspected financial exploitation of an eligible adult under chapter 6-08.5 to a law enforcement agency or the department of human services. This subsection may not be construed to impose a duty on a financial institution to investigate a suspected financial exploitation of an eligible adult or to make a report to the department of human services or law enforcement agency.

You can find Chapter 6-08.5 [here](#).

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**Question #4:** Under North Dakota’s new Unclaimed Property Law<sup>1</sup>, are ALL money orders considered abandoned after 7 years?

**Response:** Money orders are considered abandoned when the apparent owner does not claim the order within seven (7) years after issuance. [N.D.C.C. § 47-30.2-04\(3\)](#).

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### **North Dakota Federal Temporary Appraisal Waiver**

The North Dakota Federal Temporary Appraisal Waiver expired on August 7, 2021. This expiration has raised numerous questions, including what banks with branches in rural counties are supposed to do when they cannot find timely appraisals. A common question posed is whether there is an exemption for banks that service rural areas when the scarcity of appraisers delays loan origination?

Yes. The Economic Growth, Regulatory Relief, and Consumer Protection Act, passed in 2018, exempts rural properties from the appraisal requirement if certain conditions are met. Notwithstanding any other provision of law, an appraisal in connection with a federally related transaction involving real property or an interest in real property is not required if it meets all of the following conditions:

- The real property or interest in real property is located in a rural area as defined under Regulation Z;
- Not later than three days after the date on which the Loan Estimate form is given to the consumer, the mortgage originator or its agent, directly or indirectly:
  - Has contacted not fewer than three state certified appraisers or state licensed appraisers, as applicable, on the approved appraiser list in the market area;
  - Has documented that no state certified appraiser or state licensed appraiser, as applicable, was available within five business days beyond customary and reasonable fee and timeliness standards for comparable appraisal assignments as documented by the mortgage originator or its agent;
  - The transaction is less than \$400,000;
  - The mortgage originator is subject to oversight by a federal financial institution’s regulatory agency; and
  - The loan is held in portfolio, with limited certain exceptions.

An evaluation will be required in lieu of an appraisal for these rural properties.

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<sup>1</sup> During the 2021 Legislative Session, North Dakota adopted the Revised Uniform Unclaimed Property Act (RUUPA).

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## **Pipeline Foods and North Dakota Grain Regulation**

### ***Pipeline Foods***

On July 8, 2021, Minnesota-based organic grain processor Pipeline Foods LLC filed for Chapter 11 reorganization in Delaware. At the time, Pipeline estimated funds “will be available for distribution to unsecured creditors.” They estimated 200 to 999 creditors, with a total \$100 million to \$500 million of both assets and debts. The bankruptcy filing listed just 20 top creditors the company estimates it owes a total of \$20.7 million. U.S. creditors on the list are from Minnesota, North Dakota, Wisconsin, Nebraska, Ohio, Indiana, and Michigan, as well as companies in the countries of Dubai, India, and China. Despite being in discussions regarding bankruptcy going back to early 2021, Pipeline Foods continued to solicit grain and accept inventories from farmers up until the day before they officially filed; Pipeline also asked the court to allow them to sell these inventories to pay off their secured creditors instead of the unsecured farmer-creditors and producers who delivered the inventories.<sup>2</sup>

On July 30, 2021, a federal judge in Pipeline’s bankruptcy ruled that farmer-creditors of Pipeline shall be allowed to sell grain that had been pledged by Pipeline to other buyers in credit-sale contracts. Pipeline’s request for using the inventories as cash collateral would have allowed them to pay nearly \$27 million to their secured creditors; however, Minnesota Department of Agriculture regulators objected, stating that allowing secured lenders to sweep cash from the sales would result in extreme inequity to the farmers and producers. This ruling is seen as a step towards balancing out the priority of debts owed between the secured and unsecured creditors. However, while farmers can now sell their grain that was under contract with Pipeline, but still undelivered, that does not help farmers recover the amount owed from grain which was previously delivered.

Pipeline also set up most of their contracts as voluntary extensions of credit, with a section of the contract basically stating that the title of the grain would be given to Pipeline with the promise to pay back within two weeks for no other consideration. Furthermore, these contracts also stated that they were not covered by the \$500,000 bond set up by the government, as the bond is only set up to provide cover for cash sales in an insolvency, not the credit sales agreed to by the farmers.<sup>3</sup> Finally, whereas some major agriculture-based states, such as North Dakota and Iowa, have indemnity funds for farmers under their state codes, Minnesota does not. In North Dakota, Chapter 60 of the N.D.C.C. provides a statutory framework for credit-sale contract indemnity. The push from this Pipeline “debacle” will now be to establish similar frameworks in the state of Minnesota to prevent similar issues in the future.

### ***ND Grain Regulation***

The North Dakota Ag Buyer statutes underwent big changes due to House Bill 1026, passed back on March 3, 2021. Through these changes, elevators will face increased financial scrutiny, farmers will have less flexibility when it comes to choosing between cash and credit-sale

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<sup>2</sup> <https://www.agweek.com/business/7122145-Minnesota-ag-department-urges-farmers-to-file-claims-in-Pipeline-Foods-LLC-bankruptcy>

<sup>3</sup> <https://www.agweek.com/business/7147045-Bankruptcy-judge-allows-farmers-to-sell-undelivered-grain-in-Pipeline-Foods-debacle>

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contracts claims, and grain brokers must allow the join them and their bonds in insolvency proceedings.<sup>4</sup> Some other major changes include:

- The commissioner has the final say on determining an insolvency
- Once declared insolvent, the commissioner’s staff can immediately determine the status of bonds and start collecting claim
- For licenses, the bill bases the fees on dollar volume traded instead of bushels or volume
- The commissioner will have the power to determine if the grain broker negotiated a grain transaction "... with an insolvent grain buyer," or has acted with "discriminatory, predatory" or "bad faith" practices
- Bonds will be set by dollar value — not bushels, or volume
- Elevators will be required to "offer bonding" on deferred-payment contracts
- Applicants and license holders buying up to \$10 million in grain must submit balance sheets and income statements annually

The most crucial change, however, is the shift of the law as to credit-sale contracts. Under this bill both "deferred" and "price-later" contracts are required to be signed by both parties and executed in duplicate (an electronic signature will satisfy). In 2003, North Dakota established a Credit-Sale Indemnity Fund, which will pay the lesser of 80% of the amount owed to the farmer in accordance with all that farmer’s unsatisfied credit-sale contracts or \$280,000. Under the new law, farmers will be allowed to buy their own bond protection which will be offered by the elevators.; i.e., farmers and buy bond protection for the difference between their contracts and the indemnity fund. While the bill gives a lot of power to the commissioner, the bill passed without a single detractor and is supported by much of the agriculture community.

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### **CDC COVID Eviction Moratorium**

On August 3, 2021, the CDC signed an order determining that evicting residents for failure to pay rent or housing payments could lead to a spread of COVID-19. The order, in effect until October 3, 2021, applies to United States counties currently experiencing higher than usual transmission levels of the COVID-19 virus.<sup>5</sup> The ban on evictions is being labeled as a public health control measure, with the belief that extending rent and payment relief to individuals failing to make their payments will increase vaccination rates and keep people who are experiencing COVID-19 or its symptoms from going out in public and skipping isolation.

Currently, 90% of US counties fall under the "substantial or high levels of community transmission" label, and the numbers of cases continues to increase.<sup>6</sup>

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<sup>4</sup> <https://www.agweek.com/news/government-and-politics/6910803-North-Dakota-grain-regulation-bill-would-expand-Agriculture-Commissioners-power>

<sup>5</sup> <https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf>

<sup>6</sup> <https://covid.cdc.gov/covid-data-tracker/#county-view>

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The CDC also issued guidelines for determining whether an individual qualifies for protection from eviction under the new order.<sup>7</sup> To qualify, one must satisfy two separate categories; first they must fall under one of the following:

- Received a stimulus check in 2020 or 2021
- Were not required to report any income to the IRS in 2020
- Receive public benefits such as
  - SNAP
  - TANF
  - SSI
  - SSDI
- Earned less than \$99,000 as an individual or \$198,000 as a joint filer in 2020 or 2021

Second, they must satisfy one of the following:

- Household income has gone down substantially
- Been laid off from work
- Had work hours or wages cut
- Had extraordinary out-of-pocket medical expenses

If citizens satisfied both halves of the guidelines, their income levels qualify for the eviction protections. Furthermore, they also must prove that they live in a county experiencing high or substantial levels of COVID transmission, they have done their best to make timely partial payments that are as close to the full payments as possible (including obtaining government assistance to make said payments), and that if they were evicted they would have no other available housing options, thus leaving them homeless, in a shelter, or with others in close quarters.

Back on June 29th, the Supreme Court responded to a request from US housing providers to lift the previous stay on evictions implemented by the CDC and the Biden Administration on the grounds the CDC had no authority. A majority of the Court determined that the CDC indeed lacked the authority to establish a blanket ban on evictions, and further determined that any future ban require Congressional approval. On August 4, the Georgia and Alabama associations of Realtors filed an emergency motion with the US District Court to lift the ban, and while the Court agreed the decision was put on hold pending appeal, thus allowing the ban to remain in place. The options for landlords and housing providers remains limited; under the new guidelines, landlords may still initiate eviction proceedings and challenge tenant declarations that they fall within the acceptable guidelines, but it has been determined that these guidelines legally undermine the intent of the CDC order. As such, the new CDC ban is going to see multiple legal challenges from realtors, housing providers, and realtor associations over the coming weeks as the Courts attempt to decide whether the ban can legally be upheld or subsequently extended when it expires on October 3.

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<sup>7</sup> [https://www.cdc.gov/coronavirus/2019-ncov/communication/EvictionProtectDeclare\\_508.pdf](https://www.cdc.gov/coronavirus/2019-ncov/communication/EvictionProtectDeclare_508.pdf)

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## New Cannabis Bill

Back in July, Senators Cory Booker (D., NJ), Ron Wyden (D., Oregon), and Chuck Schumer (D., NY) unveiled a discussion draft of their proposed legislation to end the federal prohibition of marijuana by removing cannabis from the federal list of controlled substances and putting the onus and responsibility on states to implement their own cannabis laws without the obstruction of federal prohibition. The legislation, officially titled the Cannabis Administration and Opportunity Act, puts forth the primary goal of “...ensuring that Americans—especially Black and Brown Americans—no longer have to fear arrest or be barred from public housing or federal financial aid for using cannabis in states where it is legal.” Some of the important aspects of the legislation include the transferring of regulatory responsibility of cannabis laws from the DEA to the Tobacco Tax and Trade Bureau (TTB), the FDA, and the ATF, moving revenue generated by federal taxes to the support of restorative justice and public health and safety research, and the automatic expunging of federal non-violent marijuana crimes.<sup>8</sup>

Under the new legislation, state-compliant cannabis businesses would be treated like other businesses and would be allowed access to important financial services such as bank accounts and loans. The Discussion Draft put forward explicitly left silent numerous areas of law and the economy that this bill would affect, instead asking for comments from state and local regulators, agencies, and stakeholders. One of the areas on which the draft is silent is regarding banks under the laws of one state being allowed to take on a cannabis-related client from another state. The SAFE Banking Act of 2021 was created to address these exact concerns. The SAFE Banking Act, which was approved by the House and sent to committee in March, 2021, would generally prohibit federal banking regulators from penalizing depository institutions for providing banking services to legitimate cannabis-related businesses.<sup>9</sup> Some of the specific provisions would include establishing that proceeds from a transaction involving activities of a cannabis-related legitimate business or service provider are not proceeds from an unlawful activity, prohibiting federal regulators from terminating or limiting depository insurance solely because a financial institution provides services to a cannabis-related legitimate business, prohibiting federal regulators from taking adverse actions against, or otherwise discouraging, financial institutions from providing services to cannabis-related legitimate businesses, and protecting depository institutions from civil, criminal, or administrative asset forfeiture for providing financial services to cannabis-related legitimate businesses.<sup>10</sup>

It would be wise of states to consider enacting a similar banking act in anticipation of the potential removal of federal prohibitions against cannabis. A state-specific SAFE Banking Act would ensure protections for depository institutions in the event their state laws differ from any other state or federal restrictions and would allow lenders to feel more comfortable while navigating the booming cannabis industry.

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<sup>8</sup> <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf>

<sup>9</sup> <https://www.natlawreview.com/article/cannabis-banking-update-safe-banking-act>

<sup>10</sup> <https://www.congress.gov/bill/117th-congress/house-bill/1996>

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## **FinTech Due Diligence**

This month, the Federal Reserve posted a guide for Community Banks outlining and describing what is required for conducting due diligence regarding Financial Technology (FinTech) companies. The guide is meant to be used as a resource when determining potential relationships with companies under the FinTech umbrella. The guide was written for community banks; however, the Reserve specifically noted that the basic concepts apply to banks of all sizes. The guide touches on numerous topics involving the relationships with FinTech companies, including business experience, financial conditions, and regulatory compliance.

*Link to the guide:* <https://www.federalreserve.gov/publications/files/conducting-due-diligence-on-financial-technology-firms-202108.pdf>.

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## **ARRC–Secured Overnight Financing Rates**

The Alternative Reference Rates Committee (ARRC) recently announced that it is Secured Overnight Financing Rate (SOFR) term rates under the SOFR First initiative. This official recommendation is a large step in moving away from the USD LIBOR and providing an essential transition tool for market participants.

*Link to press release:*

[https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC\\_Press\\_Release\\_Term\\_SOFR.pdf](https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf).

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## **Data Security Insurance Update—SB 2075**

Effective August 1, 2022, North Dakota has approved SB 2075 (N.D.C.C. § 26.1-02.2), which implements the National Insurance Commissioner’s Data Security Model Act. This law will establish standards for regulators and insurers to mitigate the potential damage of a data breach by requiring insurers and regulated entities licensed by state insurance departments to develop, implement, and maintain information security programs based on their risk assessment. This law will apply to all insurers, insurance agents, and other entities licensed by the state for insurance purposes.<sup>11</sup>

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<sup>11</sup> <https://www.natlawreview.com/article/two-other-states-adopt-model-data-security-law-insurance-industry>



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## NDBA Meeting Reminders

The NDBA will be hosting group meetings September 13-16 in Grand Forks, Bismarck, Fargo, and Minot. Dates vary by city, and registration is \$65/person for members and \$180/person for associate members.

*View schedule and register at the following link (includes optional registration for golf event):*  
<https://www.cognitofirms.com/NorthDakotaBankersAssociation/NDBAGroupMeetingsSeptember13162021>.

The NDBA will also be hosting their annual Ag Credit Conference in Bismarck, ND on October 6-8 at the Ramkota Hotel. Some of the events include an optional golf tournament, multiple guest speakers, optional trap shooting, and numerous workshops.

*See schedule and register at:*  
<https://www.cognitofirms.com/NorthDakotaBankersAssociation/2021NDBAAGCreditConferenceOctober782021>.

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<h2>TRUTH IN LENDING ACT (REG Z)</h2>
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### OVERVIEW

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The Truth in Lending Act (TILA; 15 U.S.C. §§ 1601 et seq.), implemented by Regulation Z (12 C.F.R. Part 1026), requires that credit terms be disclosed in a meaningful way so that consumers can compare credit terms more readily and knowledgeably (*i.e.*, it requires that creditors use uniform terms when disclosing credit terms).<sup>12</sup> TILA further:

- Protects consumers against inaccurate and unfair credit billing and credit card practices;
- Provides ability to repay requirements and other limitations applicable to credit cards;
- Provides consumers with rescission rights;
- Provides for rate caps on certain dwelling-secured loans;
- Imposes limitations on home equity lines of credit (HELOCs) and certain closed-end home mortgages;
- Provides minimum standards for most dwelling-secured loans; and
- Delineates and prohibits unfair or deceptive mortgage lending practices.<sup>13</sup>

### APPLICABILITY

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<sup>12</sup> <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/5/v-1-1.pdf>

<sup>13</sup> <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/5/v-1-1.pdf>

For closed-end consumer loans, Regulation Z prohibits creditors from issuing compensation to loan originators or mortgagees when such compensation is based on any term other than the credit amount. Therefore, creditors cannot base compensation on whether a term or a condition is present, increased, decreased, or eliminated. Regulation Z also prohibits loan originators and mortgagees from steering a customer to a certain loan when that loan offers greater compensation to the originator or mortgagee but offers no additional benefit to the customer. For example, if a mortgage broker suggests that a customer choose an inferior loan because it offers better compensation, it is considered steering and is prohibited. In instances when the consumer compensates the loan originator directly, no other party who knows or should know about that compensation may compensate the loan originator for the same transaction. The regulation also requires creditors who compensate loan originators to keep records for at least two years.

Regulation Z provides a safe harbor when the loan originator, acting in good faith, provides loan options for each type of loan the consumer is interested in. The options, however, must satisfy certain criteria. The options presented must include a loan with the lowest interest rate, a loan with the lowest origination fees, and a loan with the lowest rate for loans with certain provisions, such as loans with no negative amortization or prepayment penalties. In addition, the loan originator must procure offers from lenders with whom they regularly work with.

The Truth in Lending Act (TILA) helps consumers shop for and make educated decisions about credit, such as auto loans, mortgages, and credit cards. TILA requires that issuers of credit provide the costs of borrowing in a clear and obvious manner. Without this requirement, some lenders may hide or not disclose terms and rates, or they may present it in a way that is difficult to understand. Before TILA, some lenders would engage in deceitful and predatory tactics to lure customers into one-sided agreements. After the Truth in Lending Act was established, lenders were prohibited from making certain changes to the terms and conditions of a credit agreement once executed and from preying on vulnerable populations.

TILA also grants consumers the right to rescind a contract subject to TILA's rules within three days. If the terms of the agreement are not satisfactory or in the consumer's best interest, they may cancel and receive a full refund.